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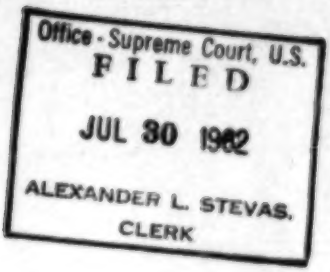

NUMBER 81-

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1981

L. B. B. CORP.

Petitioner

v.

CHARLES O. FINLEY & COMPANY, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. Joseph Nugent, Sr. of
NUGENT & NUGENT, ESQ.
15 Westminster Street, Suite 924
Providence, Rhode Island 02903
401-421-9000

ATTORNEYS FOR PETITIONER

I. Questions Presented For Review

The questions presented for review by means of this petition are: (1) Whether or not the decision of the U. S. District Court ("MEMORANDUM ORDER," APPENDIX A) granting the motion of the respondent for judgment notwithstanding the verdict ("judgment n. o. v.") following a jury trial and a disagreement among the members of the jury was correct;

(2) Whether or not the opinion ("UN-PUBLISHED ORDER," APPENDIX B) of the three-judge panel of the Court of Appeals affirming the trial court for non-substantive reasons was correct;

(3) Whether or not the denial of the Petition for rehearing, filed timely in the Court of Appeals, was correct.

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(3) Whether or not the denial of the Petition for rehearing, filed timely in the Court of Appeals, was correct.

II. Reports of Opinions Delivered Below:

The decision of the trial judge, Joseph Sam Perry of the U. S. District Court for the Eastern Division of the Northern District of Illinois,was in writing, in the form of a "memorandum order," filed on February 10, 1981; it is appended hereto as APPENDIX A. To the knowledge of undersigned counsel it is not formally reported in any published series of casebooks.

The decision of the panel of the Court of Appeals was in the form of an unpublished order entitled "Order" and was dated January 28, 1982, although not received by undersigned Counsel for the Petitioner until February 4, 1982; it is appended hereto by the Petitioner as APPENDIX B. Also appended hereto, as Appendix B1 of the Petitioner, is the "Corrected unpublished order" of the three-judge panel affirming, with costs, the order of the court of January 28, 1982, which is Appendix B. It is dated February 4, 1982.

The Petitioner also appends hereto, as Appendix C, the "ORDER" of the judges on the panel denying the petition of the plaintiff-appellant, and Petitioner herein, for rehearing, which was timely filed on or about February 10, 1982; the date of said Order is March 25, 1982.

III. Statement of Grounds of Jurisdiction Invoked:

This Petition is filed, and this Court has jurisdiction pursuant to the provisions of Section 2101 of Title 28 of the United States Code, Subsection (c), and 28 U.S.C.Sec.1254 as this is a civil action initiated in a U. S. District Court between corporate citizens of different states which was tried before a jury of a U. S. District Court and, in due course, appealed to the U. S. Court of Appeals, where judgment has been rendered and a timely

petition for rehearing denied. The date of the original judgment was February 10, 1981, the date that the appeal was claimed in the District Court in Illinois by the Petitioner was February 17, 1981. Its brief was filed on May 15, 1981. An unpublished order (Appendix B) affirming the District Court decision was filed on January 28, 1982 and corrected on February 4, 1982 (Appendices B and B1). A Petition for Rehearing (See Appendix D) in the Court of Appeals was forwarded on February 10, 1982 and was returned for non-conformity to the local rules, was then accepted for filing on March 8, 1982, and was denied on March 25, 1982 (See Appendix C). In addition, a petition for rehearing en banc was filed on February 12, 1982, and a supplemental petition for rehearing en banc was filed on April 9, 1982 (See Appendix E and Appendix F of the Petitioner, separately presented). Neither petition for rehearing en banc was considered or decided by the Court of Appeals and counsel was so informed.

IV. Constitutional Provisions, Treaties, Statutes, etc., Involved:

The Seventh Amendment to the U. S. Constitution, which reads:

> In suits at Common Law, where the value in controversy shall exceed

twenty dollars, the right of the trial by jury shall be preserved, and no fact tried by a jury, shall be otherwised reexamined in any court of the United States, than according to the rules of the Common Law.

Rule 10 of the Federal Rules of Appelate Procedure, which reads in part:

* * *

(b) (1) Within ten days after filing the notice of appeal the Appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the Clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the Appellant shall file a certificate to that effect.

(2) If the Appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the Appellant shall, within the ten days time provided in (b) (1) of this Rule , file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings

to be necessary, he shall, within ten days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within ten days after service of such designation the appellant has ordered such parts and has so notified the appellee, the appellee may within the following ten days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript."

Rule 50 (b) of the Federal Rules of Civil Procedure:

> Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of jugment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may re-open the judgment and either order a new trial or direct the

entry of jugment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

V. Concise Statement of the Case:

This appeal, in a word, is unnecessary. It is a result of a comedy of errors. A brief review of the record should lead this court to conclude that summary relief is appropriate.

The major ground of the petitioner's appeal from the Memorandum Order of the District Court (see Appendix A) was that the trial judge erred in entering judgment notwithstanding the verdict on or about February 10, 1981, after a jury was unable to agree on a verdict in December, 1980 after a five-day trial. The decision of the trial judge to enter judgment notwithstanding the verdict ("Judgment n. o . v.") was so manifestly erroneous on the face of the written decision itself that relief should have been summarily granted in the court of appeals, rather than the opposite.

During the trial on December 4, 1980, the trial judge, after hearing the respondent's motion for a directed verdict, stated as follows:

> "THE COURT: I think that this is a case for the Jury. Motion denied."

On December 8, 1980, while the jury below

was in deliberation, the Court decided in the absence of counsel to discharge the jury and declare a mistrial, then stated as follows:

> "THE COURT: Gentlemen, you are now discharged. I will invite you into my Chambers to take a look at an exhibit that I have.
>
> And of course, there will have to be a new trial; that is if the Plaintiff persists in a new trial. And the reason that I have asked now as to the division, is in order to guide the principles and the parties to what their future conduct might be. It might be possible that the plaintiff may not choose to try the case again under the circumstances, but that is the decision. You are now discharged.
>
> And I will invite you in. Ms. Marshal, you may bring them into my Chambers, and I will discuss the matter with them — not the case, I will not discuss the case, but only my exhibit but which is in my Chambers. (Emphasis supplied).

It should be noted here that this case was originally filed in 1974 and, after assignment to two active judges of the District Court, who were unable to try it because of their case loads, was assigned to an eighty-one-year-old senior retired judge, who heard it on December 1-5, 1980 before a jury. It should also be noted that His Honor's statements quoted here are taken directly from stenographer's transcripts which were provided to the Court of Appeals as appendices to the

brief of the appellant-petitioner.

In any event, notwithstanding the aforequoted representations made on the record at the time that he declared a mistrial, in the absence of counsel and clients, the trial judge apparently failed or refused to refrain from discussing the case with the jurors after they had been invited into his Chambers to see his exhibit. That is evident from the memorandum decision filed by him on February 10, 1981, which is attached hereto as Appendix A. In that "Memorandum Order" the trial judge stated as follows:

> " . . . The court desires to note that after the jury's decision, the jurors were invited into the court's chambers to view a mastodon exhibit; that while they were out of the presence of each of the counsel, the jurors briefly discussed their decision and stated that five of them had found in favor of the defendant while only one had found for the Plaintiff. This disclosure was later made known by the Court to each party's counsel.
>
> "In view of the foregoing,it is ORDERED that each of the aforesaid motions of the defendant be and the same hereby is granted . . ."

It was therefore the view of the Appellant, the Petitioner here, that the decision of the trial judge in February, 1981 to enter judgment n. o . v. in favor of the defendant was inconsistent with his earlier decision not to discuss the case with the jurors, if not improper because of his reliance on what he had been told, off of the record, by the

members of the jury out of the presence of counsel, and that the manifest error of the trial judge would cause a reversal of his decision by the Court of Appeals.

Nevertheless, counsel to the Plaintiff-Appellant-Petitioner, out of an abundance of caution,
had all proceedings following the conclusion of testimony transcribed by the court reporter and appended to its brief for the Court of Appeals.

To further narrow the issues and focus the attention of the Court of Appeals, the Petitioner did not request the Court of Appeals to decide whether or not the trial judge incorrectly weighed or viewed the evidence in granting the judgment n. o . v. The Petitioner stopped at the threshhold question of whether or not the Court observed the correct standards to be employed in determing whether or not judgment n. o. v. should have been entered and, further, whether or not it was reversible error for the trial court to have failed to have supported its decision with express findings of fact and conclusions of law.

Nevertheless, after oral argument before the Court of Appeals was allowed to be waived on December 1, 1981, the three-judge panel to which the appeal had been assigned notified counsel to the Appellant, Petitioner herein, of the necessity for additional transcribed matter. That was on December 19, 1981. See

Petitioner's Appendix D. While attempting to obtain clarification of the amount of transcribed material that the panel wanted, the Appellant/Petitioner received the proverbial bolt out of the blue in the form of Appendix B.

On January 28, 1982, the panel filed an unpublished per curiam decision wherein it denied and dismissed the appeal of the Petitioner. The panel viewed the appeal as raising three issues, and decided them (its first mistake) in an order other than in which they were raised. The first issue raised, namely that the Appellee had not complied with F. R. Civ. P. 50 in filing its motion for directed verdict was determined to be not well-founded because, according to the Court of Appeals, the Appellee had in fact complied with the Rule in filing its motion for judgment n. o. v. The third issue raised, treated in Appendix B as issue number "(2)," was that the trial judge should have supported his decision to grant the motion from the respondent for judgment n. o. v. with express findings of fact and conclusions of law; it was deemed to be without merit because the Rules of Civil Procedure do not explicitly require District Court judges to make such findings of fact and conclusions of law. The last issue considered, and the second issue raised in the brief of the Appellant/Petitioner, namely that the defendant's motion for judgment n. o. v. should not have been granted in the first place, was disposed of by a sua sponte

dismissal in light of the presumed and mistaken violation by the Plaintiff-Appellant of Rule 10 (b) (2) of the Federal Rules of Appellate Procedure. That Rule, in the view of the panel, unequivocally requires all appealing parties in the Court of Appeals to include in the record a transcript of all evidence presented at trial. That, of course, is not the language of the Rule. *

Since the Appeals Court's disposition of "third assertion of error" of the Petitioner was based on an assumed violation of the Rules of Appellate Procedure, the Plaintiff-Appellant petitioned for rehearing by the three-judge panel and moved for enlargement of time in which to obtain and file a complete transcript of the trial proceedings if deemed necessary by the Court. (see Appendix D). In the petition for rehearing, the Plaintiff-Appellant-Petitioner argued that the panel was mistaken in assuming that the Appellant had violated F. R. A. P. 10 by failing to provide adequate transcripts to permit the Court or Appeals to make an informed decision, that whether or not a complete trial transcript was provided the record appended to the brief of the Appellant revealed reversible error so clearly as to not require any additional transcription of any additional evidence, and that the Petitioner had not at any time

*The panel was not so technically strict when the Respondent filed its Brief four days out of time, in violation of Local Rules 7 and 8.

intended to urge on appeal that "a finding or conclusion is unsupported by the evidence or is contrary to the evidence". F. R. A. P. 10 (b) (2). The Petitioner also pointed out in its petition for rehearing that the Seventh Amendment to the U. S. Constitution, as interpreted by this Court in Slocum vs. New York Life Insurance Co., 33 S. Ct. 523 (1913) and Baltimore & Carolina Line vs. Redman, 55 S. Ct. 890 (1935) had probably been violated by the refusal of both the District Court and the Court of Appeals to give the Petitioner a new trial. See also Bonner vs. Coughlin, 657 F.2d 931 (7th Cir. 1981) and Munn vs. Mutual Services Casualty Insurance Co, 88 F. R. D. 364,367, fn. 8 (N.D. California 1980).

These arguments were apparently unconvincing because the three-judge panel denied the petition for rehearing on March 25, 1982. (see Appendix C) and would not reconsider the case en banc.

The basis for federal jurisdiction in the District Court, in the first instance, was its diversity jurisdiction, so-called, pursuant to 28 U. S. C. Section 1332. This is and was a contract action, within an additional count alleging Unjust Enrichment, arising from the execution of a written contract by principals of Rhode Island and Illinois corporations in Chicago in 1973. The jurisdiction of the federal courts was never questioned.

VI. Amplification, as Required by Supreme Court Rule 17:

This is not simply a case where the clarity of the errors in the trial and appellate courts necessitate both consideration and relief. This case also presents reasons for consideration of a special character.

For example, it is possible that the decision of the Court of Appeals refusing to impose upon district court judges in its district the requirement of setting forth express findings of fact and conclusions of law when entering judgment n. o. v. is in conflict with decisions of other circuits' Courts of Appeals. This in addition to the obvious intent of the drafters of the rules of civil procedure that contested civil actions decided without a jury or with an advisory jury, as apparently was the case here, shall contain findings of fact and separate conclusions of law. See F. R. Civ. P. 50 (b) and 52 (a). See also 5A Moore's Federal Practice p. 2736.

In the Sixth Circuit, it has been held that it is commendable for a trial judge disposing of a case under F. R. Civ. P. 50 to divulge his rationale, if only to insure a responsible review at the appellate level and full and fair consideration of each case by the lower courts of the Circuit. Garrison vs. Jervis B. Webb Co., 583 F.2d 258 (6th Cir. 1978). The same court, in Morelock vs.

N. C. R. Corp., 586 F.2d. 1096 (6th Cir. 1978), a case involving a post-jury verdict entry of judgment n. o. v., the Court of Appeals stated the obvious, namely that it is better for all concerned for a trial court to delineate with specificity its reasons for the entry of judgment n. o. v. rather then merely stating in conclusory terms that there is no substantial evidence to support the verdict. Other Courts of Appeal of the federal circuits have recognized the wisdom of express findings of fact by trial justice in dispositive proceedings, including the Court of Appeals for the Seventh Circuit. (See United States vs. Shaheen, 445 F.2d. 6 (7th Cir. 1971), Boazman vs. Economics Laboratory, Inc., 537 F.2d. 210 (5th Cir. 1976), Steed vs. Central of Georgia Ry., 477 F.2d 1303 (5th Cir. 1973), Dolgow vs. Anderson, 438 F.2d. 825 (2nd. Cir. 1970), Lea vs. Cone Mills, Corp., 467 F.2d. 277 (4th Cir. 1972), Hodgson vs. Humphreys, 454 F.2d. 1279 (10th Cir. 1972) and In Re. Uranium Antitrust Litigation, 473 F. Supp. 382,390 (N. D. Ill. 1979).

Parenthetically, it should be noted that the decision of the Court of Appeals to refuse to interpret F. R. Civ. P. 50 (b) and 52 (a) as requiring trial judges to set forth findings of fact and conclusions of law when deciding cases without a jury was clearly at variance with a decision of the same court in the same term, which stated

that a reversal will follow for failure of a trial judge to reserve decision on a motion for a directed verdict during the trial before granting a motion for judgment n.o.v. See Bonner vs. Coughlin, 657 F.2d 931 (7th Cir. 1981)

There is also a significant constitutional question raised in this appeal, involving the application of the Seventh Amendment. There is obvious conflict between F. R. Civ. P. 50 (b) and the Seventh Amendment protecting the right to trial by a jury in civil cases. In Slocum vs. New York Life Insurance Co., 228 U. S. 364 (1913) the High Court ruled that the entry of judgment n.o.v. was a violation of the Seventh Amendment. This was, of course, before adoption of F. R. Civ. P. 50 in the 1930s. Thereafter, present Rule 50 (b) practice was distinguished and approved in Baltimore & Carolina Line vs. Redman, 295 U. S. 654 (1935). However, it was not approved without qualification. In Redman, the High Court permitted the court to enter judgment n.o.v. because it was deemed by the Supreme Court to be a reservation of a decision on an earlier motion for directed verdict. 295 U. S. at 658-659. Moreover, the Court found that the issue raised in the reserved motion for directed verdict did not invade the province of the jury because it merely addressed the issue of whether the evidence was sufficient as a matter of law. The conclusion is inescapable that the Court would rule that a Constitutional violation occurs if, as a

factual matter, as in this case, sufficient evidence was present and the court reversed the jury verdict. It should be noted that, additionally, in Redman supra, the entry of judgment n. o. v. was affirmed only because the district court, which had been reversed by the Court of Appeals for failing to grant a reserved motion for a directed verdict after the jury returned for the Plaintiff, had "expressly reserved its ruling on the defendant's motions to dismiss and for a directed verdict," both of which were based on the asserted legal insufficiency of the evidence. In this case, the motion of the respondent at the trial for a directed verdict was unqualifiedly denied by the trial judge, who did not reserve his decision at any point on any motion for a directed verdict. Hence, the Seventh Amendment rights of the Petitioner were violated.

Finally, there is the question of whether or not the Court of Appeals, in interpreting F. R. A. P. 10 (b) as requiring the filing of transcripts of all evidence adduced at trial, even when parties do not raise the issue of the sufficiency of the evidence to support the adverse determination of the trial court, so far departs from the accepted and usual course of judicial discretion as to call for an exercise of this Court's power of supervision. F. R. A. P. 10 (b) requires the Appellant to order from the court reporter

a transcript "of such parts of the proceedings not already on file as he deems necessary, subject to local rules of the Courts of Appeals." In this case, the Petitioner, within ten days after filing its notice of appeal, ordered from the reporter a transcript of such parts of the proceedings not already on file as it deemed necessary. See Appendix D, specifically Affidavits of counsel contained therein. The same rule, F. R. A. P. 10 (b) (2) requires that the Appellant, if it intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, must include in the record a transcript of all evidence relevant to such finding or conclusion. That requirement might justify the filing of a complete trial transcript. However, in this case, the Appellant argued that the decision of the trial judge granting the motion for judgment n. o. v. was so clearly deficient on its face as to justify a reversal and a new trial. The Appellant did not urge on appeal that a finding or conclusion of the trial judge was unsupported by the evidence or was contrary to the evidence. Moreover, the same rule, F. R. A. P. 10 (b) (3), requires the appellee to move in the district court for an order requiring the Appellant to file additional transcribed testimony if the appellee feels that the transcripts provided by the Appellant are inadequate. In this case, the appellee neglected to do so.

Hence, there is a serious question of

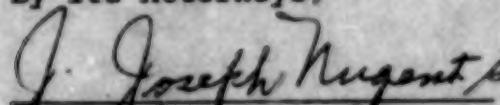
the extent of the Court of Appeals' discretion in requiring compliance with Rule 10. Does it have unfettered discretion? Can it ever abuse its discretion, if that discretion is limited? If both of those questions are answerable in the affirmative, then the Court of Appeals has done so in this case.

VIII. Appendix:

The appendices of the Petitioner are separately presented in compliance with Supreme Court Rule 21.1 (k), and contain a frontis piece as well as a table of contents. The judgment sought to be reviewed may be found at Appendix B.

Respectfully submitted,

L. B. B. Corp.
By its Attorneys,



J. Joseph Nugent, Sr.
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401-421-9000

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed via regular, postage prepaid, first class U. S. Mail, three exact copies of the within Petition for Issuance of Writ of Certiorari, together with three copies of the Appendices in support of said Petition to Samuel V. P. Banks and Terrence P. LeFevour, Attorneys for the respondent, at their regular and usual place of business, 221 North LaSalle Street, 38th Floor,Chicago, Illinois 60601 on June 23, 1982 at approximately 3:00 P.M. by depositing same in a mailbox at the United States Post Office.

J. Joseph Regenstein